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Supreme Court of the United States

OCTOBER TERM 1951

No. 134

A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORPORATION, COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, A/S DAMPSKIBSSELSKABET SVENDBORG, N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP CORPORATION, ELLERMAN'S WILSON LINE, LTD., and SOUTH ATLANTIC STEAMSHIP LINE INC., as members of NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, and/or CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Appellants

v.

ISBRANDTSEN CO., INC. and UNITED STATES OF AMERICA

Appellees

FEDERAL MARITIME BOARD and UNITED STATES DEPARTMENT OF AGRICULTURE

Intervenors

REPLY MEMORANDUM FOR APPELLANTS A/S J. LUDWIG MOWINCKELS REDERI, ET AL.

1. It will be noted that neither appellee Isbrandtsen nor the Department of Justice in their respective briefs here rely on or pretend to support the theory and basis of the Court below—substantially a play on "arbitrary"—on which it based its opinion and issued a permanent injunction. The brief for Isbrandtsen substitutes another play on words, i.e., as to "unduly" on account of its absence

from Sec. 14(3) of the Shipping Act. Both briefs substantially disregard Sec. 14(4) of the Act, and neither brief gives to the second paragraph of Sec. 15 of the Act the credit to which it is entitled both by its language and by the long practice thereunder, of which the Maritime Board's decision of December 1, 1950, is the most recent example, controlling as we believe controversies of every nature as concerns the contract rate practice now here under consideration.

The implication from said two briefs would seem closely to approach the proposition that the Shipping Act and the several procedures thereunder afforded and prescribed by Congress have no place in a litigation of this character.

2. The dialectics indulged in by Isbrandtsen produce, indeed, a curious situation. In the first place, Sec. 14 (4) which specifically prohibits a common carrier from making any "unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered", etc., is substantially neglected and disregarded by counsel—doubtless because they could not fit the same into their condemnatory argument. Next, they distort the concept of Sec. 14 (3) which focuses on "Retaliate". Retaliation by a common carrier is vicious and naturally should be prohibited. This prohibition against retaliation is stated to be in respect of space accommodations and extends against "resort to other discriminatory or unfair methods". It is modified and controlled by the clause reading "because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment or for any other reason". These limitations in Sec. 14 (3) fairly preclude the contention of Isbrandtsen that this sub-section 3 contemplates the subject of contract rates as falling within retaliation, particularly since sub-section 4 deals specifically with shipper contracts. It will be recalled that the court below assumed that the Board might under some circumstances approve a contract rate system (R. 120). That assumption, so far as it goes, was a determination *against* appellee. No appeal was taken by it, notwithstanding that the sole basis of the

complaint was that the contract rate system or practice was unlawful *per se* and could not lawfully be approved by the Board.

3. If the arguments for Isbrandtsen and the Department of Justice as to Sec. 14(3) of the Act were sound, there would have been no occasion for inclusion in the Act of the provisions relating to carrier discriminations contained in Secs. 16 and 17 thereof, to say nothing of Sec. 15. The respective statutory provisions and procedures would according to the aforesaid arguments be made and become wholly inconsistent and ridiculous.

The argument by the Department of Justice (Brief, pp. 24-35) that Sec. 14(3) should be interpreted as intending an absolute bar to any rate differential where substantially the same service is involved is contrary to the whole spirit of the Act. It follows as a logical conclusion that such argument would bar well recognized legal rate-making policies such as proportional rates, port equalization and other absorptions, etc. See *Pacific Westbound Conference Agreement*, 2 U. S. M. C. 775; *Larrowe Milling Co.* v. *Baltimore Insular Line, Inc.*, 2 U. S. M. C. 549; *Intercoastal Rate Structure*, 2 U. S. M. C. 285.

4. It should not be assumed that appellants were devoting their purposes and energies to eliminating Isbrandtsen from the trade. The commerce of the United States which is in an important sense a part of the commerce of the entire world, conducted and protected by the Conference system as contemplated by the Shipping Act, was their principal concern. Isbrandtsen was not the only non-conference carrier. The record (303-4) named two others and several others could have been and still can be named—both as concerns the east bound and west bound trades. Non-conference carriers are not generally conducting regular liner services, as are the appellants. The conferences are open to admission of all carriers, and particularly to those which maintain or propose to maintain regular service. The absolute right to admission has been enforced by the

administrative body. Example of its action in this regard is *A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line)* v. *United States Lines Company (United States Lines) et al.*, 2 U. S. M. C. 321, decided by the Maritime Commission April 26, 1940, requiring admission of a carrier complaining of exclusion. In the last paragraph at page 330 the Commission found:

> "* * * that defendants' denials of membership to Mowinckels have been without just and reasonable cause; that such denials while at the same time maintaining exclusive patronage contracts with shippers create unjust discrimination and operate unfairly as between complainant Mowinckels and defendants, thus subjecting Conference Agreements Nos. 4490 and 185 to disapproval under section 15 and in complainant Mowinckels being subjected to undue and unreasonable prejudice and disadvantage, in violation of section 16 of the Shipping Act, 1916, as amended. Defendants will be allowed 30 days within which to admit complainant Mowinckels to full and equal membership in each of the two conferences, failing which consideration will be given to the issuance of orders disapproving the conference agreements."

This decision deals specifically with "exclusive patronage contracts" as appears also on page 327 thereof, from which we quote the following:

> "Specific testimony of complainant and defendants here involved is that most shippers of commodities which move in large volume in the Continental and French Atlantic eastbound trades have signed the exclusive patronage contracts. Some shippers stated they would prefer not to sign the contracts, but that they desired the greater frequency in sailings of conference lines, and that to refuse would create difficulty in meeting competition of other manufacturers. Testimony of the conference chairman is that approximately 75 percent of the cargo, other than grain, moves under such contracts. Cosmopolitan Line's representative also stated that when soliciting eastbound cargo he had been told by shippers under contract that the line could not expect

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to obtain any business from them unless it was a member of the conference with the privilege of participation in the contracts."

5. Appellee Isbrandtsen would not appear to have been endowed beyond other carriers with guardianship and protection of the interests of shippers and of the commerce of the United States. All carriers are bound to treat all shippers fairly. The charge of discrimination in respect of the contract rate practice has had no real shipper support in this case. Appellee does not appear to have been commissioned to speak for shippers in addition to its own interests as represented by the complaint. The Government shipments referred to by the Secretary of Agriculture are entitled to the ~~non~~ contract rates (lowest) without the Government's signing a contract (R. 648). The private agricultural shipments involved move almost entirely in bulk and are also not subject to contract (R. 640-1). There is no proof that the Secretary has been requested by agricultural shippers to take any action on their behalf. Pacific Coast Borax Company did not offer any witness or participate in the hearings. One witness, Malatzky, gave testimony at the hearing relative to occasional shipments in the Mediterranean trade, not here involved (R. 1025). His general interest in shipping appeared to have three facets (R. 1019-21).

The brief for Isbrandtsen in footnote on page 5 suggests that its Vice President considered that the "entire Conference situation and rate situation" was not policed "sufficiently" by the Maritime Commission. This testimony followed what may justly be regarded as an example of his alertness in his opinions on the subject of majority vote and unanimous vote in the Conferences—also appearing in the same footnote (Brief, 4-5). As to his disappointment with the Maritime Commission's policing, it would seem that he had overlooked or failed to appreciate duly the decision and report of United States Shipping Board Bureau July 12, 1935 in *Investigation—Section 19, Merchant*

Marine Act, 1920, 1 U. S. M. C. 470. Perhaps the reason for this lies in the fact that the decision relates so largely to the practices of Isbrandtsen's predecessor company.

That decision shows that in June, 1928, when Isbrandtsen-Moller entered the Atlantic Far East Trade, it immediately began cutting the established Conference rates. This resulted in a general collapse of the rate structure in the trade, and withdrawal of members from the Conference. The United States Shipping Board Bureau reported "With the withdrawal of these lines the conference virtually ceased to function. The chaotic conditions which followed, demoralized the trade." There were negotiations between the Conference and the company but Hans Isbrandtsen, its president, stated that in any arrangement with the Conference, he "reserved the right to make his own arrangements with certain shippers in the Far East who had been his support in the past." The Conference, believing that any such exceptions involved the extending of unlawful preferential treatment to such shippers, rejected these reservations and the negotiations were discontinued (pp. 477-478).

In speaking of Isbrandtsen's activity in the West Coast Far East trade, the Bureau in *Section 19 Investigation* said (p. 483):

> "In 1929 Isbrandtsen-Moller entered this trade by diverting its Atlantic Coast steamers to Los Angeles en route to the Far East. According to the testimony of shippers Isbrandtsen-Moller customarily solicits business in this trade on the basis of rates 10 percent lower than those of the conference."

Later when Isbrandtsen entered the North Atlantic Trade, the same practice prevailed. The Bureau in the same investigation said (487):

> "A statement submitted by this witness showed 168 rate reductions attributed to the rate cutting practices of Isbrandtsen-Moller. The majority of

these reductions were at least 25 percent below the conference tariff and approximately one-third of them were reductions of over 40 percent."

The Bureau quoted a traffic manager of one American flag carrier testifying to the competitive methods of Isbrandtsen-Moller and another carrier as follows (487):

> "It is obviously impossible for American steamers to compete with these tactics, although I have sometimes felt that it would be wise for the United States Lines and the American Merchant Lines to cut loose from the conference and meet the nonconference lines on their own ground; but such action would be so costly, not only to ourselves but to other American flag conference lines that we have been reluctant to take this step. Furthermore, if we were to create a situation whereby we met the nonconference lines at every turn by reduction in rates, they probably would disappear from the picture temporarily and return again when rates became stabilized. It seems hopeless, therefore, for the conference lines, even with the highest principles of building up the commerce of the country and at the same time reasonably benefiting themselves, to correct this nonconference parasite; and our hope and prayer is that the Shipping Board will take some action that will bring about a situation that is reasonable and just to the carrier and shipper and in the general interest of industry and commerce."

The Bureau went on to say of these practices (488):

> "In none of these transatlantic trades have conditions as yet become as demoralized as in the Far East trade, but it is clear from the record that Isbrandtsen-Moller and the United States Navigation Company by means of their rate-cutting methods are filling their ships at the expense of the conference carriers who are endeavoring to stabilize the trade."

6. Isbrandtsen's brief (p. 13), without citing any evidence for the proposition, stated that out of 100 conferences in the world only 24 were attempting to make use of the dual

rate system. There is no evidence in the record on this subject. There is nothing to show how the figure of 100 conferences was arrived at, or which of them were conferences in any real sense, which were rate making conferences, which were passenger conferences or which were intercoastal conferences. There is also no evidence to show how the figure of 24 contract rate conferences was arrived at or how many other conferences had deferred instituting or reinstituting contract rates because of economic conditions or the pendency of this very litigation. What evidence there is in the record indicates their general use (R. 768, 955).

7. In a footnote at page 13 of its brief, Isbrandtsen states that out of 1700-1900 items in the previous tariff of these conferences only 706 items had been under contract in the prewar contract rate system. This is correct but misleading. The 1700-1900 items include many of academic interest only, of which there is no appreciable or repeated movement, *e.g.*, Walrus, live, in crates; Skunk hair tails, etc., etc. The items regularly moving in any quantity were in the main covered by the previous contract rate system. (R. 712, 741-743). It should be mentioned that it is quite possibly preferable to extend the contract rate system across the board to avoid any charges of discrimination by separate treatment of separate commodities.

8. Again on page 13 of its brief Isbrandtsen tends to emphasize the lack of proof of the necessity of the contract rate system at the particular time that it was reinaugurated. This overlooks the basic objective of contract rates in creating long range stability. In lush times of full cargoes and shortage of vessels the contract rate system may be of much greater value to shippers (and indeed to Isbrandtsen with its unlimited freedom to raise its rates) than it is to the conference carriers. However, the conference carriers feel, and the Federal Maritime Board realizes, that the reasonable assurance of patronage for fixed periods of time with protection against destructive rate wars and increasing losses is beneficial to the shipping industry as well as to the

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shippers. The contract rate system is of greatest importance in times of surplus of vessels and shortage of cargo when there is a compelling urge to cut rates to fill otherwise empty ships and mitigate losses. It is in essence nothing more than a self-protecting device such as was not only permitted but encouraged by the various Congressional enactments referred to in our main brief, pp. 36-7.

9. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 581 (cited in Isbrandtsen's brief, p. 46) is no authority to establish an improper discrimination in the present situation. In the *Mechling* case the Interstate Commerce Commission had sought to adjust through-rate disparities arising out of transportation by barge over part of the through route and this Court held that it had not given effect to the special recognition accorded lower cost water transportation by the Interstate Commerce Act as amended.

10. The dictum of the District Court in *Baltimore & Ohio R. Co.* v. *United States*, 22 F. Supp. 533, 538 (cited in Isbrandtsen's brief, pp. 48-9; the Department of Justice's brief, p. 50) relates to an alleged discrimination as between connecting interstate carriers where the Congressional objective was obviously to promote the absolute freedom of interchange of service without preference or advantage in any particular—distinguishable from the situation prevailing with respect to persons and localities. It is of interest to note that the Interstate Commerce Act provision there referred to does not contain the absolute prohibition against discrimination with respect to persons which appellees would seek to inject into Sec. 14(3) of the Shipping Act, but only undue or unreasonable discrimination such as is barred generally by the Shipping Act as well as the Interstate Commerce Act.

11. The Maritime Commission decision in *Contract Routing Restrictions*, 2 U. S. M. C. 220, relied upon by both appellees (Isbrandtsen brief, pp. 52-3; Department of Justice brief, p. 25) can be of comfort to them only by the

careful selection of particular comments without reference to the facts or to the Commission's holding. The discrimination there commented upon was in relation to commerce originating in the Great Lakes as against Atlantic Coast ports and not as between shippers. The holding was not that the contracts with the shippers were invalid. On the contrary, they were sustained provided that the carrier respondents, within a specified period, modify them to eliminate the specific discrimination between ports there assailed.

Respectfully submitted

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January 28, 1952.